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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 698

WORZ, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION

and

MID-FLORIDA TELEVISION CORP., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR MID-FLORIDA TELEVISION CORP. IN OPPOSITION

MARCUS COHN
Counsel for Respondent,
Mid-Florida Television Corp.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OPINION BELOW

The opinion of the Court of Appeals is reported at 323 F. 2d 618 (C.A.D.C.); the order by that Court denying a Petition for Rehearing *en banc* is reported with the main opinion. The Report and Recommendation of the Commission is not officially reported, but is unofficially reported at 22 Pike and Fischer R.R. 125.

JURISDICTION

The judgment of the Court of Appeals remanding this cause to the Federal Communications Commission was entered on July 5, 1963 (Pet. App. 6A). The order denying Petitioner's request for a rehearing *en banc* was dated September 23, 1963 (Pet. App. 7A). The Petition for a Writ of Certiorari was filed December 23, 1963. The jurisdiction of this Court has been invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Intervenor does not agree with the statement of questions presented as set forth in the Petition, pp. 2-3. Intervenor believes the questions presented are:

(1) Whether the Commission and the Court of Appeals were correct in determining that Mid-Florida Television Corp. (Mid-Florida), an applicant for a construction permit for a new television broadcast station at Orlando, Florida, was not disqualified to be a television licensee due to *ex parte* contacts made to former Federal Communications Commissioner Mack by William H. Dial, when the *ex parte* contacts were in no way initiated, secured, aided, or authorized by Mid-Florida, and when the principals of Mid-Florida had no knowledge whatsoever that such contacts had been made until public knowledge thereof was given by the Congressional Subcommittee on Legislative Oversight; and

(2) Whether the Court of Appeals could only have sustained the Commission's reversal of the ultimate factual determinations of its Examiner if those determinations were "clearly erroneous" or were overcome by a "very substantial preponderance of the evidence."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and the pertinent statutory sections involved in the instant proceeding are set forth in the Petition, p. 4.

STATEMENT

Petitioner seeks certiorari on a decision by the Court of Appeals for the District of Columbia Circuit which reviewed a Report and Recommendation made by the Federal Communications Commission, and which remanded the matter to the Commission for further proceedings.

In 1952 and 1953, respectively, Petitioner, WORZ, Inc. (WORZ) and the Intervenor below, Mid-Florida, applied for authority to construct a new television station at Orlando, Florida. A comparative hearing was held on these applications before Hearing Examiner Basil P. Cooper and, in 1955, Cooper proposed that the WORZ application be granted and the Mid-Florida application denied (R. 1567-1657; 2315-2405).

Mid-Florida and the Commission's Broadcast Bureau contested the Examiner's decision and urged that the decision rested on erroneous findings and conclusions. Oral argument was held before the Commission *en banc* on June 19, 1956, and on June 7, 1957, the Commission released its decision overruling the recommendations of the Examiner, and granting Mid-Florida's application (R. 1720-1844; 2523-2617; 32 F.C.C. 1254).[1] The Commission found, on the basis-

[1] Commissioners McConnaughey, Bartley, Doerfer, Lee and Mack voted to grant Mid-Florida's application. Commissioner Hyde did not participate and Commissioner Craven abstained. Commissioners McConnaughey, Lee, Doerfer and Mack were no longer members of the Commission when the Commission later rendered the further Report and Recommendation now under review.

of the usual standard comparative criteria utilized in cases of this nature, that Mid-Florida was the better qualified applicant. The Commission held further that WORZ had intentionally concealed the fact that the father of the WORZ principals, William O. Murrell, Sr., was a party-in-interest to the WORZ application (R. 1803-1810; 2606-2613; 22 FCC at 1330-1336). The Commission criticized Mid-Florida for the conduct of one of its officers, Hyman Roth, an attorney, and at the time the President of the local Bar Association, who failed to disclose his personal interest in the case when he called the Commission's attention to disbarment proceedings against Murrell, Sr. (R. 1810-1811; 2613-2614; 22 F.C.C. at 1336-1337). The Commission held, however, that neither the conduct of WORZ's principals nor the conduct of Mid-Florida's officer warranted disqualification (R. 1811, 1813; 2614, 2616; 22 F.C.C. at 1337, 1339).

WORZ thereupon appealed the Commission's decision to the United States Court of Appeals for the District of Columbia Circuit, which, in a *per curiam* opinion of May 15, 1958, affirmed the Commission's decision and denied a WORZ Petition for Rehearing *en banc*.[2]

WORZ thereafter filed a Petition for Certiorari in this Court. The United States and the Commission filed a Brief in Opposition urging that the Writ be denied on the merits. The Brief, however, pointed out that during the hearings conducted before the Subcommittee on Legislative Oversight on June 2, 1958 (which hearings were held subsequent to the 1958 deci-

[2] *WORZ, Inc.* v. *Federal Communications Commission*, 257 F. 2d 199 (C.A.D.C.). Petition for Rehearing *en banc* denied June 10, 1958.

sion by the Court of Appeals affirming the Commission's decision), it was brought out that, while the case was pending before the Commission, a resident of Orlando made an *ex parte* presentation regarding the qualifications of WORZ to a member of the Commission. In light of this fact, the Solicitor General and the Commission recommended that the denial of Certiorari should not foreclose any future action which the Commission might take with regard to the information contained in the Hearings.[1] The Court granted Certiorari on October 27, 1958, vacated the judgment of the Court of Appeals, and remanded the case to the Court of Appeals "for such action as it may deem appropriate."[2]

Argument was had before the Court of Appeals on the question of the further appropriate procedures to be followed, and the Court ultimately remanded the case to the Commission, with instructions to hold an evidentiary hearing to determine the nature and source of all *ex parte* pleas and other approaches that were made to the Commissioners while the proceedings were pending, and any other factors that might be thought to require either disqualification of some Commissioners from participating in the reopened proceeding or disqualification of some parties from receiving any award that may ultimately result.[3] The Court of Appeals retained jurisdiction of the case.

[1] *WORZ, Inc. v. Federal Communications Commission*, 358 U.S. 55.

[2] *WORZ, Inc. v. Federal Communications Commission*, 268 F. 2d 887, 890 (C.A.D.C.).

[3] A request by WORZ for rehearing *en banc* of the remand was unanimously denied on June 5, 1959. WORZ's subsequent Petition for Writ of Mandamus in the Supreme Court was denied (361 U.S. 805).

Following the remand by the Court, the Commission on July 29, 1959, ordered that the record be reopened and a further hearing held on the *ex parte* matter (Supp. R. 2618-2619; 2912-2913).

The evidence at the further hearing showed that Dial did, in fact on two occasions discuss the case with Commissioner Mack. Dial, however, testified that (a) he did not inform Mid-Florida before the meetings of his intention to discuss the case with Mack, (b) that following his conversations with Mack and prior to the final decision, he did not reveal to Mid-Florida that these conversations had taken place, and (c) that in making these approaches he was acting solely in his own behalf as a citizen of the community involved and in furtherance of what he believed to be the community's best interest.[3] Dial's testimony in this regard was fully and completely corroborated by the testimony of Mid-Florida's principals and by the testimony of Mid-Florida's Washington counsel who was charged with the prosecution of the Mid-Florida application before the Commission.[4] This evidence clearly demonstrated that Mid-Florida had not in any way retained Dial for the purpose of making any *ex parte* contacts whatsoever, and that Mid-Florida first learned of Dial's *ex parte* activities when the matter was brought to light in the Congressional Hearings long after the Commission had rendered its 1957 Final Deci-

[3] Supp. R. 2672-74; 2830-31; Tr. 228-30; 231-15; 238-40; 247-9; 253-55; 2301-05; 2307; 2317-20; 2458-61; 2462; 2500.

[4] Supp. R. 2852-71; Tr. 250-51; 257-61; 2611-17; 2652; 2658-59; 2672-2; Supp. R. 2700-36 (Brosnan); Tr. 2743-55; 2777; Supp. R. 2714-41 (Kluge); Tr. 2993; 3000-09; 3014-15; 3023-24; 3043 (Dobie). (Supp. R. citations refer to that portion of the record filed after the hearing on the remand.

sion granting the frequency to Mid-Florida.[*] Accordingly, the Examiner found that Mid-Florida had not directly or indirectly "secured or aided" Dial's activities in discussing the case with Mack (Supp. R. 2856-57; 22 Pike and Fischer R.R. at 1333-34), and accepted the testimony of all of the principals of Mid-Florida and Dial himself that Dial had not been retained for this purpose and that no person connected with Mid-Florida had requested Dial to intervene with Mack. The Examiner further found and concluded (Supp. R. 2853; 22 Pike and Fischer R.R. at 1331):

> "There is no direct or affirmative evidence as such that in his ex parte approaches herein above found, Dial was acting under instructions from, or with the knowledge and consent of, the Mid-Florida group, of that he ever informed them, prior to the action of the Congressional Committee, . . . that he had any conversation with Mack concerning the case.

Notwithstanding the absence of any direct evidence linking Mid-Florida with Dial's *ex parte* conversations and despite the fact that the evidence demonstrated that Mid-Florida did not retain Dial for the purpose of making these contacts nevertheless, Hearing Examiner Cunningham concluded in his Initial Decision released September 19, 1961 that at some unspecified time and in some unspecified manner Mid-

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[*] The Hearing Examiner specifically found that Dial, a local Orlando lawyer, was retained by Mid-Florida solely to legally investigate the so-called "Radio Row" matter and to report to Mid-Florida any developments before the local Bar concerning it so that Mid-Florida would have at its disposal all of the facts presently to the Commission which it was considering. Hearing Examiner Cunningham's Initial Decision (Supp. R. 2850; 22 Pike and Fischer R.R. at 1327).

Florida had become aware of and had "ratified" Dial's improper representations. This conclusion was not based upon the demeanor or evasiveness of the witnesses who testified before him, but instead was based upon his belief that as a matter of "normal human experience" it was "inconceivable and incredible" that Dial would not and did not notify the Mid-Florida group of his activities after they had taken place. The Examiner thereupon concluded that the alleged "knowledge and ratification" of Dial's activities demanded that Mid-Florida be disqualified, and that the participation of Mack in the Commission's 1957 decision rendered the proceedings void (*Id.* at 2856-57; 22 Pike and Fischer R.R. at 133-34).

Mid-Florida took exception to the Examiner's decision and the case was considered by the Commission *en banc*. On January 3, 1963, the Commission released its Report and Recommendation (22 Pike & Fischer 125). The Commission concurred with the Examiner's conclusions that as a result of Dial's contacts with Mack the original proceeding was void, and held that its 1957 decision had to be set aside and a new decision rendered. Moreover, the Commission accepted the basic findings of fact of the Examiner. It held, however, that the evidence did not support the Examiner's determination that Mid-Florida had learned of or ratified Dial's activities. The crux of the Commission's disagreement with the Examiner was stated as follows (22 Pike & Fischer at 126(e)):

> Review of the record reveals no evidence which might lend support to the Examiner's conclusion, and, as he admitted in his initial decision, "there

is no direct evidence, as such, rebutting [the] assertions [of Dial and Mid-Florida's principal]". As noted in our findings, Dial and Mid-Florida's principals have steadfastly denied that the latter were the inspiration for, or were informed of, Dial's conversations with Mack. Sworn denials, while not conclusive of the facts, are not to be brushed aside lightly on the basis of an indefinable "normal human experience." This is not to say that the circumstances of Dial's conversations with Commissioner Mack might not raise a reasonable suspicion that Mid-Florida's principals were connected therewith in some manner. Such suspicion, however, is overcome by the sworn testimony, unimpeached on this record, of Dial, Kluge, Breckner, and Dobin. Suspicion, speculation, and conjecture are not proper substitutes for evidence, and cannot of themselves form the basis for conclusions that an applicant engaged in improper conduct requiring its disqualification and that two or more witnesses testified falsely. Thus, it is concluded that Mid-Florida did not secure, aid, confirm, ratify, or have knowledge of Dial's conversations with Mack and that nothing revealed in the instant proceedings can be held to detract from Mid-Florida's qualifications as a licensee of this Commission.

Chairman Minow concurred in the majority's conclusion that Mid-Florida was not to be disqualified. He felt, however, that the Examiner's determination that Mid-Florida had learned of and ratified Dial's conduct should be accepted. Chairman Minow was of the view that the Commission, after a new oral argument, should decide whether to grant one of the existing applications or to reopen the record for new applications (22 Pike & Fischer at 126(c)-126(h)).

Upon the filing by the Commission of its Report and Recommendation with the Court of Appeals, WORZ

urged that the Commission's conclusions were erroneous and should be set aside.

The Court of Appeals on July 5, 1963 issued its decision and remanded the cause to the Commission for further proceedings. The Court accepted the view of all the Commissioners that Mid-Florida in no way initiated, secured, requested or retained Dial for the purpose of making the *ex parte* conversations and that neither Mid-Florida nor WORZ was disqualified (Pet. App., p. 5A). It also accepted the determination of the majority that Mid-Florida had not been aware of these conversations or ratified them. However, the Court believed that Chairman Minow's recommendations as to further proceedings were more appropriate and held "in line with the Chairman's position . . . that the Commission is authorized to decide, after new oral argument, whether to grant one of the existing applications or to reopen the record for new applications." The Court further instructed that the Commission should consider what it termed "the serious question concerning the character of WORZ's principals," the Roth incident, and the Dial incident. With reference to the latter, it stated that "although the Commission has concluded Mid-Florida's principals were not aware of their attorney's *ex parte* communications with former Commissioner Mack, even so such communications were in fact made by Mid-Florida's attorney." (Pet. App., p. 5A)

WORZ petitioned for rehearing *en banc*, which was denied on September 23, 1963 and WORZ thereupon filed its Petition for Certiorari.

ARGUMENT

The Petitioner first seeks to have this Court review the 1958 decision of the Court of Appeals which affirmed the Commission's 1957 decision (Pet., pp. 18-20). The Commission, with the approval of the Court of Appeals, has however already declared that the 1957 decision is void, and this Court has vacated the Court of Appeals' 1958 decision (358 U.S. 55). Therefore, the Court of Appeals' 1958 decision and the 1957 Commission decision are no longer subject to review. If Petitioner is dissatisfied with any future Commission decision, it can appeal the decision to the Court of Appeals and, if appropriate, to this Court.

Second, Petitioner contends that even though Mid-Florida did not secure, aid or retain Dial in his *ex parte* contacts, had no knowledge of them, and did not ratify them, nevertheless, as a matter of law, Mid-Florida must be disqualified (1) because Dial was an attorney-agent of the application and (2) because failure to disqualify Mid-Florida would permit it to retain the benefits of Dial's improper conduct (Pet., pp. 20-22). A client, however, is not bound by improper acts of an attorney, such as those disclosed here, when those acts are not within the scope of his employment, where the client was not aware they had taken place, and where the client never ratified them. In the instant case, the Hearing Examiner, the Commission, the Court of Appeals, and the concurring Commissioner all agreed that Mid-Florida in no way initiated, aided, sanctioned, or otherwise expressly or impliedly retained Dial for the purpose of making the *ex parte* contacts and therefore it is quite plain that these activities were not within

the scope of Dial's authority.[9] *Root Refining Co. v. Universal Oil Products Co.*, 169 F. 2d 514 (3d Cir.), upon which Petitioner relies, makes clear that before a client will be charged with the conduct of an attorney in attempting to influence a decision, it must be demonstrated that the acts were undertaken pursuant to the client's instructions, and with his knowledge or acquiescence. In *Root* the Court specifically formulated an issue as to whether the purpose of the attorney's employment or retainer was the expectation that the lawyer would exercise improper influence.[10] Where the client did not retain the attorney for this purpose, had no knowledge of his conduct, and did not ratify it, it would be manifestly unjust to disqualify the client. The decision of the Commission that Mid-Florida was not disqualified was clearly within the Commission's discretionary power; it was correct and the Court of Appeals properly accepted the Commission's determination in this regard.

Further, Petitioner's assertion that Mid-Florida will be permitted to retain the "fruits" of Dial's conduct is clearly incorrect. The Commission has now set aside its 1957 decision awarding the frequency to Mid-Florida, and Mid-Florida is again placed in the position which it held in 1957 prior to the Commission's grant; it must seek to overturn Hearing Examiner Cooper's Initial Decision which proposed a grant to WORZ and a denial of the Mid-Florida application. Moreover, the Commission, under the Court of Ap-

[9] Dial in fact was not even a general attorney for Mid-Florida, but had been retained for one specific and limited purpose—to investigate the Roth matter and to report on his investigations to Mid-Florida. See fn. 5, *supra*.

[10] See 169 F. 2d at 520, 536.

peals' decision, must consider what comparative demerit, if any, Dial's unauthorized activities may have upon its qualifications, even though it in no way authorized them or had any knowledge concerning them. Finally, under the Court of Appeals' opinion, the Commission is authorized to reopen the proceedings to other applicants. Thus, Mid-Florida has been completely insulated from any possible benefits it might have received as a result of Dial's unauthorized activities. The Commission's decision on the merits of this controversy will now be made by Commissioners who had no contact with Dial and who, as both the Commission and the Court of Appeals found, were not improperly approached in any manner concerning the case.

Finally, Petitioner argues that under *Universal Camera Corp.* v. *National Labor Relations Board* (340 U.S. 474), the Commission did not have the power to overrule Hearing Examiner Cunningham's findings because there did not exist in the record "a very substantial preponderance of the testimony" to support the Commission's decision (Pet., pp. 22-25). In effect, Petitioner contends that the Commission could only reverse its Examiner if his factual determinations were "clearly erroneous," [11] a rule rejected by this Court in *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358.

Universal Camera itself, held that the "clearly erroneous rule" was not applicable to, and was wholly inconsistent with, the powers of regulatory agencies

[11] As this Court pointed out in *Allentown Broadcasting, infra*, the "clearly erroneous" rule is substantially identical to the "very substantial preponderance" rule urged by Petitioner. See 349 U.S. at 364

such as the Commission. The Court held that the same standard of review normally applied to agency actions, namely, substantial evidence on the whole record, applied. The *Allentown Broadcasting* cases reaffirmed this Court's decision in *Universal Camera* and specifically rejected the contention urged here by Petitioner, *i. e.*, that an Examiner's determinations are not to be overruled by the Commission without a "very substantial preponderance in the testimony as recorded." This Court held in *Allentown* that such a standard was an erroneous standard of review even where the Hearing Examiner's determinations were based upon findings as to "demeanor" of the witnesses. Thus *Allentown Broadcasting* and *Universal Camera* stand for the proposition that the decisions of the Commission will not be disturbed where substantial evidence exists on the whole record to support them even where the Commission reverses a Hearing Examiner who had made findings on the "demeanor" of the witnesses, and where "credibility" was in issue. *A fortiori* the Court of Appeals' decision in this case affirming the Commission was correct since the determinations of the Examiner here were *not* based upon demeanor or evasiveness, but upon his opinion as to "human experience" and upon his opinion as to the inferences to be drawn from the nature of the testimony. The Commission was equally competent to the fullest degree to evaluate the testimony and it had full power to reject the erroneous speculations which the Examiner had utilized in arriving at his determination.

The Commission viewed the facts as requiring the conclusion that Mid-Florida was unaware of Dial's activities. This determination was clearly consistent

with the evidence and supported by substantial evidence on the whole record.[12] Under these circumstances, Petitioner's allegations that the Commission was without power to reach such a determination are without merit.

CONCLUSION

The decision below is correct, the Court below applied the proper standards in reviewing the Commission's decision, and no question warranting further review is presented. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MARCUS COHN
Counsel for Respondent,
Mid-Florida Television Corp.

January 22, 1964.

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[12] It was entirely within the Commission's authority to give full weight and credit to the sworn uncontradicted testimony of Dial and Mid-Florida's principals concerning Mid-Florida's lack of knowledge of what Dial had done. *Chesapeake & Ohio Ry. v. Martin*, 283 U.S. 209, 214-216-20; *Dickinson v. United States*, 346 U.S. 389, 396-97.